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BRIEF OF PLAINTIFFS IN ERROR.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1901.

No. 207.

G. H. THAYER, ADMINISTRATOR OF THE ESTATE OF DAVID WHITNEY, JR., DECEASED; D. C. WHITNEY AND CHARLES STINCHFIELD, TRUSTEES UNDER THE WILL OF DAVID WHITNEY, JR., DECEASED, SUBSTITUTED FOR DAVID WHITNEY, JR., AND CHARLES STINCHFIELD, AND JAMES A. REMICK, TRUSTEE, PLAINTIFFS IN ERROR,

vs.

A. N. SPRATT.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Plaintiffs in Error.

T. H. WARD,
GEO. C. STOUT,
Attorneys for Defendant in Error.

In Error to the Supreme Court of the State of Washington.

FILED

(18,346.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

G. H. THAYER, Administrator of the Estate of David Whitney, Jr., Deceased, D. C. WHITNEY and CHARLES STINCHFIELD, Trustees under the Will of David Whitney, Jr., Deceased, Substituted for DAVID WHITNEY, JR., and CHARLES STINCHFIELD, and JAMES A. REMICK, Trustee,

Plaintiffs in Error.

vs.

A. N. SPRATT,

Defendant in Error.

18,346.

Brief of Plaintiffs in Error.

This is a writ of error issued to the Supreme Court of the State of Washington to review a decree of that Court, which decree affirmed the decree of the Superior Court of the State of Washington, holding defendant in error to be the equitable owner of the southeast quarter (SE¼) and the northeast quarter (NE¼) of Section thirty-two (32), Township nine (9), north range four (4), west of the Willamette meridian, and directing plaintiffs in error to execute a deed to defendant in error for said property.

STATEMENT OF THE CASE.

This suit was brought by the plaintiffs in error against the defendant in error to remove a cloud from plaintiffs' title to the whole of section thirty-two, township nine north, range four west. It is alleged in the bill that the plaintiffs are the owners of all of said section thirty-two.

That there are on the records of Cowlitz county, Washington, four deeds, to-wit:

1. One deed from Frank Smith to A. N. Spratt; date, October 13, 1884; recorded March 20, 1884; warranty in form; purporting to convey to said A. N. Spratt the northeast quarter of said section thirty-two; which deed was recorded on page 81 of Book "I," records of deeds of said county.

2. One deed from James M. Radcliffe to A. N. Spratt; warranty in form; of date, February 13, 1884; purporting to convey to said A. N. Spratt the southeast quarter of said section thirty-two; which deed was recorded March 20, 1884, at page 98, Book "I," Records of Deeds of Cowlitz, Washington.

3. One deed from James M. Radcliffe to A. N. Spratt for the southwest quarter of said section thirty-two, and one deed from Frank Smith to A. N. Spratt for the northwest quarter of said section thirty-two; both of said deeds being recorded in the records of deeds for Cowlitz county, Washington. Inasmuch as plaintiffs' contention as to these two deeds was sustained in the court below and the deeds cancelled, no question arises on this appeal as to them, or as to the title to the northwest or southwest quarter of said section thirty-two.

It is further alleged in the bill that these two deeds—the one from Smith, and the other from Radcliffe—for the northeast quarter and the southeast quarter of said section thirty-two constitute a cloud on plaintiffs' title; and the prayer of the bill is that they be cancelled.

The defendant answered and as to these two quarter sections said that Frank Smith had entered the northeast quarter of section thirty-two and James M. Radcliffe had entered the southeast quarter of said section as timber land, and on May 26, 1883, made application to purchase the same, both applications being made on the same day. That they each complied with the law in relation to purchase of timber land, and each paid to the government the amount prescribed by law, to-wit, four hundred dollars, and each received on August 20, 1883, a receiver's certificate; and that on February 13, 1884, each for a valuable consideration sold his quarter section to defendant A. N. Spratt for the sum of $800, and executed to Spratt the deeds described in the complaint and sought to be cancelled.

It is then alleged in the answer that after said Smith and Radcliffe had made their final payment to the government, as above set out, and after Sprat had so purchased said two quarter sections and had obtained and recorded his deed therefor, and on, to-wit, the 21st day of January, 1886, the Commissioner of the General Land Office cancelled said entries of said Smith and Radcliffe and subsequently issued a patent for said northeast

quarter of section thirty-two to Benjamin L. Henness and a patent for the southeast quarter of section thirty-two to Ellis Walker; and that plaintiffs deraign title through said Henness and Walker.

The proceedings of the land department leading up to the cancellation of Smith's and Radcliffe's entries are set out in detail in the answer with a particularity unnecessary to be repeated here. But it is alleged by the defendant that the land department proceedings were invalid, and the pretended cancellations of the two entries a nullity because of the fact that no notice was ever served on Spratt of the holding of these entries for cancellation or of the cancellation of them. It is then claimed by defendant that the title now held by plaintiffs deraigned from the government through Henness and Walker is held in trust for defendant and a decree is asked to that effect.

A demurrer to this answer was filed, which was overruled, and plaintiffs replied, denying the new matter in the answer and putting the case at issue. The case was tried by the court, and the findings of fact and conclusions of law are found on pp. 25-41 of Transcript of Record.

The pleadings are quite lengthy, but there are no disputed *facts*, except two, that is, 1st, as to the character of the land on these two quarter sections—whether or not it was timber land at the time of the entry, and, 2d the good faith of the entries.

In the trial in the court below both sides stipulated into the case the complete records of the land department; copies of which records, together with all the testimony taken on this trial, are found in full in the Statement of Facts. To avoid the necessity of a reference to those records and to present the two points involved in this writ of error as clearly as may be, the following facts may be considered to have been established by the testimony and stipulation.

1. On May 26, 1883, Frank Smith, a citizen of the United States, made application at the Land Office at Vancouver, Wash., to purchase the northeast quarter of section thirty-two, township nine north, range four west, under the act of Congress of June 3, 1878, as timber land.

2. On August 20, 1883, no adverse claim having been filed, said Frank Smith made his proof covering his said application in the form and manner provided by the statute; paid the United States $400, and received therefor a receiver's duplicate receipt executed in due form.

3. That on February 13, 1884, said Frank Smith executed to A. N. Spratt his warranty deed for said quarter section, reciting a consideration of eight hundred dollars, which deed was recorded in the records of deeds of Cowlitz county, Wash., March

20, 1884, on page 81, book "I," records of deeds of said county.

4. That on October 3, 1884, S. P. C. Stubbs, a special agent of the General Land Office, reported in writing to the Commissioner of the General Land Office that said quarter section was agricultural land and was not timber land; and that the said entry was fraudulent and made for speculative purposes; and said report was accompanied by the affidavits of C. N. Hogan and B. A. Dietz, substantiating the correctness of the report.

5. That it appeared from said written report of said Stubbs that Frank Smith had executed to Spratt the deed above described and that the same was of record in Cowlitz county Wash.

6. That thereafter, on October 21, 1884, based on the report of said S. P. C. Stubbs, special agent, the Commissioner of the General Land Office suspended action on said entry of said Frank Smith and notified the receiver and register of the Land Office at Vancouver, Washington, by letter, of the fact that action had been suspended upon said entry, and directed said register and receiver to appoint a time for hearing before said register and receiver of evidence to be offered by the United States and said Frank Smith touching the validity of said entry. That in his said letter notifying the said register and receiver of the suspension of said entry of said Frank Smith said Commissioner directed the said register and receiver of the Land Office at Vancouver to issue due notice of the time and place of said hearing, informing the entrymen of the nature and substance of the special agent's report, and advising him that in default of an appearance at said hearing his entry would be finally cancelled. That in said letter said Commissioner also directed that if said register and receiver had knowledge that the land had been transferred for them to also notify the transferee. That said Commissioner in said letter to the register and receiver also stated that it appeared from the report of said special agent that said Smith had transferred the land by warranty deed, dated March 13, 1884, to the defendant herein A. N. Spratt.

7. That thereafter, by letter "P," dated October 17, 1885, said Commissioner of the General Land Office of the United States notified said register and receiver that said order for hearing on the report of Special Agent S. P. C. Stubbs concerning said timber entry of said Frank Smith was rescinded and the entry in question held for cancellation on the showing made in said special agent's report, and directed said register and receiver to notify claimant, informing him of the nature and substance of the special agent's report, and advising him that he would be allowed sixty days in which to appeal to the Secretary of the Interior or to show cause why his entry should be sustained in accordance with circular of instructions of July 31, 1885, and that if no

appeal be taken and he failed to show cause why his entry should be sustained, the same would be finally cancelled.

8. That thereafter, on October 29, 1885, Fred W. Sparling, the register of said Land Office at Vancouver, Washington, deposited in the postoffice at Vancouver, Washington, a registered letter addressed to Frank Smith, Oak Point, Cowlitz county, Washington (now state) Territory, the same being the postoffice address of said Frank Smith. That in said letter as aforesaid said Fred W. Sparling, register of said Land Office, stated that said timber entry of said Frank Smith is held for cancellation upon the report of said Special Agent S. P. C. Stubbs, further stating that in said report, it is alleged, that the tract in question is covered with fir, cedar and hemlock trees; that it is good agricultural land, gently rolling, somewhat rough in places, and can be successfully cultivated after the timber is removed, and that said entry of said Frank Smith is fraudulent and made for the purposes of speculation. It was also stated in said letter addressed to said Frank Smith, at Oak Point, Cowlitz county, Washington (now state) Territory, that the said Frank Smith would be allowed sixty days within which to file an appeal from the action hereof to the Honorable Secretary of the Interior, or to show cause why his said entry should be sustained; and if he failed to file an appeal or show cause why his entry should be sustained within said time, his entry should be finally cancelled. That said letter of said Fred W. Sparling, register, was never received by said Frank Smith, and was thereafter returned to said register of the Land Office at Vancouver by the postmaster at Oak Point, Washington (now state) Territory, marked "uncalled for."

9. That on January 21, 1886, the Commissioner of the General Land Office cancelled the entry of said Frank Smith for said quarter section and notified the register and receiver at Vancouver, Washington, that said entry was cancelled.

10. That no notice was ever served upon the defendant A. N. Spratt of any of the proceedings in the Land Office touching the cancellation of said entry.

11. That A. N. Spratt was a non-resident of the State of Washington during all the time covered by the Land Office proceedings above referred to, residing at Alpena, Michigan, and neither he nor Frank Smith ever appeared before the land department in said proceedings for the cancellation of said entry.

12. That on April 9, 1888, said entry of Frank Smith having been cancelled, Benjamin L. Henness made a homestead entry on said quarter section, commuted the same to cash, and on June 25, 1890, a patent was issued to said Benjamin L. Henness, and plaintiffs' claim title through mesne conveyances from

said Henness, and were in possession of said land at the time of bringing this suit and have paid taxes thereon since August, 1890.

Precisely the same facts, except as to the name of entryman, exist with reference to the southeast quarter of said section thirty-two.

James M. Radcliffe filed his application to purchase this quarter section May 26, 1883; made his proof August 20, 1883; received his duplicate receipt the same day; deeded to Spratt February 13, 1884; the special agent reported the land to be agricultural and not timber, and the entry fraudulent October 3, 1884; the same proceedings were had in the Land Office resulting in the cancellation of Radcliffe's entry, January 21, 1886.

The regularity of plaintiffs' title is not questioned—that is, it is admitted that the chain is complete from the government patentee to plaintiffs; but it is claimed that the cancellation of Smith's and Radcliffe's entries is void because made without notice to Spratt.

Three questions arise in this writ of error.

I.

Was Spratt entitled to notice of the proceedings in the Land Office resulting in the cancellation of the entries?

II.

The Land Department having cancelled the entries of Smith and Radcliffe, on the ground of their being fraudulent, and that the land was agricultural and not timber land, is not that a decision of a question of fact and is not the judgment of the officers of the Land Department conclusive and not reviewable by the courts?

III.

Conceding that Spratt was entitled to notice of the proceedings to vacate the Smith and Radcliffe entries, and that he did not have such notice, is he not compelled in his suit to show by his testimony the existence of the same facts that the entrymen, Smith and Radcliffe, would have been compelled to show upon the hearing ordered before the register and receiver of the Land Office?

ARGUMENT.

I.

Was Spratt entitled to notice of the proceedings in the Land Office resulting in the cancellation of the entries?

We are not unaware of the decisions of this Court in the case of Guaranty Savings Bank vs. Bladow, 176 U. S., 448, and in Hawley vs. Diller, 178 U. S., 476.

In these cases this Court held that in proceedings looking to the cancellation of a homestead or timber land entry in the Land Department a mortgagee or transferee should be notified. But the opinions in these cases must be read in connection with the facts before the Court in each case. In Hawley vs. Diller there was no question but that the notice had been given. There was personal notice of the contest served upon the assignee of the entryman. In Savings Bank vs. Bladow, the mortgagee, after the cancellation of the entry, but *before* the issuance of patent, filed in the Land Office proof of its interest and an application that patent be issued to it as mortgagee of the entryman. Presumably the Savings Bank *could* have been notified by personal service of the finding of the proceedings in the Land Department. And because it was not notified when it could have been and ought to have been, this Court sent the case back to the lower court to the end that the mortgagee might "seek such other relief as it may be advised" in the premises. But this case is different. Here it appears from the record that at the time of the cancellation of the entries of Smith and Radcliffe, Spratt was a non-resident of the state of Washington. It does not appear that his place of residence was known to the department. It does not appear that there is or was at the time of the cancellation of these entries any law providing a method of service under the circumstances. Personal service could not be had, of course, because the residence of Spratt was unknown, and service by publication would be no service unless some statute made it so. *Spratt could not be served at all in any manner known to the law.* What should the department have done under the circumstances? If the contention of defendant in error is correct, it could do nothing. Of what use to proceed and cancel the entries if at any time in the future when all the proofs of the fraudulent nature of the entry have been lost and the witnesses all dead and after the government has patented the land to some one else, Spratt may emerge from his hiding and claim the land because he was not notified of the cancellation proceedings. It would follow that the government couldn't patent the land to Smith or Radcliffe because the

entries were fraudulent, and it couldn't cancel the entries because no service could be made upon Spratt. The government couldn't deal with this land in any way until Spratt should appear, and if he never appeared no patent could ever be issued for the land. It is not likely that this Court will sustain such a contention. It may be that when service on the purchaser from the entryman is practicable the department should notify such purchaser of proceedings to cancel the entry so that he may have an opportunity to protect his equity, but before the assignee can be heard to complain of the want of such notice it must appear that such notice could have been given, and if it was given proof could and would have been furnished by the assignee, which would have prevented the cancellation of the entry. The claim of defendant in error here is set out in his answer as follows: (pp. 12 and 13, Transcript of Record) "The defendant further answering the complaint avers that prior to the time he purchased said land and paid for the same he had no notice, knowledge or intimation or information whatever that said James M. Radcliffe was not entitled to make such entry of said land or that said land was not subject to entry under the said act of June 3rd, 1878, but that this defendant in good faith, without any such notice, knowledge, intimation or information purchased said land from said James M. Radcliffe and paid the sum of $800 to him therefor, believing that the said Radcliffe was the owner thereof, and had a good right to purchase the same under said act of June 3rd, 1878, and that said land was subject to entry and purchase under said act as timber land. And this defendant is the *bona fide* purchaser of said land, and these plaintiffs and their predecessors in interest took and now hold and have held the title to said land in trust for this defendant and they are now the trustees of this defendant of the title to said land."

This whole contention is wrong and has been repeatedly so held by the courts. The plea of *bona fide* purchases is in effect the initiating of a new claim of title. The pleader bases his title upon his deed and his good faith in taking it. He says in effect that no matter what the defects or irregularities may be in the title of his grantors, *he* gets a good title because he has paid full value in good faith without notice. But this never applies to the purchases of a mere equity. And an equity was all that Spratt got or could get by his purchase from Smith and Radcliffe. He could not get the legal title, because that was still in the government. He got only such right as Smith and Radcliffe had, and he bought at his peril. In the case of American Mortgage Co. vs. Hopper, 64 Fed., 559, the Court of Appeals for the 9th Circuit thus announces the law governing this class of cases:

"Appellant claims that it is a *bona fide* purchaser for value, and that it is entitled to protection upon this ground. The law is well settled that the purchaser of an equitable title takes only such interest in the property as his grantor had at the time of his purchase. Waddel, by his certificate of purchase, only obtained the right to a patent for the land, provided his acts were legal, and in all respects such as to warrant the issuance of a patent to him. His rights were in a measure dependent upon the subsequent action of the land department, within its legitimate authority, of ascertaining whether he had complied with all the prerequisites prescribed by law, and whether he was lawfully entitled to the land in question. His purchase of the land was subject to the rules and regulations of the land department. It is true that the entry was sufficient to satisfy the register and receiver of the local land office; but it was subject to the control and supervision of the Commissioner of the General Land Office, and the action of the register and receiver was liable to be reversed on appeal. When appellant purchased the land it took it subject to the final action of the land department, and to such proceedings as might thereafter be had in the courts to affirm or set aside the rulings of the officers of such department in regard thereto. It purchased the land before the issuance of a patent. The legal title was still in the government. It therefore obtained, by its purchase, only an equitable interest in the land, and is not, for the reasons stated, entitled to protection as a bona fide purchaser. Shirras v. Caig, 7 Cranch, 34; Vattier v. Hinde, 7 Pet. 252; Boone v. Chiles, 10 Pet. 177, 210; Smith v. Custer, 8 Dec. Dep. Int. 269; Root v. Sheilds, Woolw. 341. Fed. Cas. No. 12,038; Randall v. Edert, 7 Minn. 450 (Gil. 359); Shoufe v. Griffith (Wash.), 30 Pac. 93. In Smith v. Custer, *supra*, Secretary Vilas clearly enunciated the principles applicable to the case. He said: "The pre-emption purchaser takes, by his final proofs and payment and his certificate of purchase, only a right to a patent for the public lands in case the facts shall be found by the General Land Office and the Interior Department, upon appeal, to warrant the issuance of it. Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the further action of the department, and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public lands he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses."

Spratt not being a *bona fide* purchaser and being precluded from setting up that defense, the question of notice or not notice becomes unimportant.

In Cal. Redwood Co. vs. Litle, 79 Fed. Rep. 856, the case was this: One Bohal made pre-emption entry, received certificate of purchase and sold to the complainant. The Commissioner of the General Land Office cancelled Bohal's entry without giving complainant any notice of the intended cancellation, and the land was subsequently patented to respondent. The suit was brought to declare respondent trustee of the legal title for complainant's benefit. It was contended in that case, that the cancellation of Bohal's entry was a nullity because the Redwood Company, his grantee, was not notified. That the Redwood Company took without notice of any defects in Bohal's title, and was a bona fide purchaser for value, and could not be affected by any action of the land department subsequently had without notice to the Redwood Company. Answering this contention, the Court (Morrow, J.) says (p. 856-57):

"In my opinion, the complainant in this case has failed, upon its proofs, to show that it had, or now has, a better right to the land than the respondent Litle has under his patent. It is contended, however, that the ruling of the Commissioner of the General Land Office cancelling the entry of Bohal was void and of no effect for the reason (1) that the complainant received no notice of such proposed action, and was therefore deprived of its property rights without due process of law; (2) that the ruling of the Commissioner does not appear to have been approved by the Secretary of the Interior and the Attorney General, as provided in section 2451 of the Revised Statutes; and (3) it is claimed, as before stated, that in any event, the complainant is a bona fide purchaser, and cannot be deprived of the land in controversy by the subsequent issuance of a patent to another. With reference to the first and third propositions, I deem it unnecessary to enter into any discussion of the case, for the reason that the identical questions were passed upon by the Circuit Court of Appeals for this circuit in the case of Mortgage Co. v. Hopper, already referred to, and are therefore binding upon this court, under the doctrine of *stare decisis*. A reference to that decision will show that it involved a suit precisely similar to the one in the case at bar, and that the facts relating to the original fraudulent entry, subsequent cancellation by the Commissioner of the General Land Office, and the subsequent issuance of a patent to a later and bona fide entryman, are closely analogous. The two propositions referred to and now urged in this case were elaborately and ably considered by the Circuit Court of Appeals, as well as other propositions common to both cases, and they were decided adversely to the contention of the complainant. I shall therefore content myself by simply referring to, and resting my decision upon the authority of, that case."

In the case of Cooke v. Blakely, 50 Pac. 981, the facts were as follows: On July 23, 1879, L. W. Cooke filed application to purchase the land in dispute, and on May 21, 1880, made final proof therefor, paid for same and received duplicate receiver's receipt. On the same day he sold the land to Edward Cooke, by warranty deed, which was duly recorded. On July 1, 1880, Edward Cooke executed a mortgage on the land to Thomas S. Koutz. On February 18, 1880, one Blakely entered the same land, made declaratory statement, and on March 22, 1883, made final proof, paid for the land and received receiver's certificate. On November 30, 1885, patent was issued to Blakely. On August 25, 1880, Blakely began a contest to cancel Cooke's entry. Notice of contest was served on Edward Cooke only, and no notice was served on Koutz, the mortgagee. The register and receiver cancelled Cooke's entry, and this decision was affirmed January 30, 1882. The case was then appealed to the Secretary of the Interior, who affirmed the decision of the Commissioner on January 17, 1883. No notice of the contest proceedings was served on Koutz, and he had no actual knowledge of the same or of Blakely's claim to the premises until after the contest proceedings were over. Koutz brings suit to foreclose his mortgage and makes all parties defendants. Clearly if Koutz was not entitled to notice in that case, Spratt is not in this. The point of plaintiffs' contention is stated on page 982 of the decision thus:

"Plaintiffs in error contend that the cancellation of Cooke's entry was erroneous for these reasons: First, that it was done without notice to Koutz and without any knowledge by him of the institution or pendency of the contest."

The court overruled this claim, and said in reference thereto (p. 982):

"In vol. 1, Dec. Dept. Int. 106, Commissioner McFarland, in an official communication to a register and receiver concerning a contest case, ruled as follows: 'This office does not recognize purchasers or third parties prior to issuance of patent. . . . The doctrine of bona fide purchasers is not applicable to one who purchases from a settler before patent. As the settler has only an equity, the purchaser must abide by the disposition of the case by this department, irrespective of notice or recognition.' See further as sustaining this proposition, Featherspill's case, 4 Land Dec. Dept. Int. 570; Hill's case, 5 Land Dec. Dep. Int. 276; Joline's case, Id. 589; U. S. v. Lawrence, 16 Land Dec. Dep. Int. 47.

"The return of the purchase money was not a condition precedent to the cancellation of Cooke's entry, nor would repayment be authorized in a case where the entry is cancelled on account

of false testimony in the final proof." Walsh's case, 5 Land Dec. 319; Woodward's case, 2 Land Dec. 688; Reynold's case, 12 Land Dec. 131; Hatch's case, 12 Land Dec. 607.

That the department had a right to cancel the Smith-Radcliffe certificates cannot be questioned. In Guaranty Bank vs. Bladow, 176 U. S. 457, this Court said: "When Anderson obtained the decision of the register and receiver upon his application for the land it was subject to the power of the land department to reverse the judgment of those officers and upon facts showing that the entry was fraudulent the department had power to cancel it. *This could be done upon the same evidence which was before the register and receiver and at least upon notice to the party entering the land.*

When the department in this case cancelled the Smith and Radcliffe certificates, whether that cancellation was rightfully or wrongfully made, these certificates ceased to exist for any purpose. These certificates carried no title. They never were even evidence of title—they were but evidences of the existence of conditions and the performance of acts which would entitle the holder to title. The right of the holder of the certificate to receive the legal title does not come from the certificate, but arises because of the doing of certain things and the existence of certain conditions which entitled him primarily to the certificate. The certificate is prima facie evidence that these things have been done and those conditions exist and that the holder of it is entitled to patent.

In Guaranty Bank vs. Bladow, *supra*, the Court said:

"Our conclusion upon the whole case is that the cancellation of the entry *was valid as regards Anderson* and that the effect of such cancellation was to *prevent the plaintiff in error from using the entry as prima facie evidence of the right of Anderson to patent.*" And this, although no notice was served upon plaintiff in error of the proceedings to cancel. Applying that rule to this case we see that Spratt, whether the certificates were cancelled rightfully or wrongfully as to him, could not have re-lied even on proceedings in the land department upon these certificates after the order cancelling them. He cannot therefore use them in any manner in this suit. As to him, it is as though they had never existed—whether he received notice of their cancellation or not. And this order, as against Smith and Radcliffe, cancelling the entries as being fraudulent, is not reviewable by the courts, because it is a decision of a question of fact, and this Court has always held that where there has been a hearing or where the entryman had an opportunity to be heard, the decision of the land department on a question of fact is final. If Smith and Radcliffe had not sold to Spratt and if this suit was brought against them by plaintiff in error, neither Smith nor Radcliffe

would have any standing whatever in court to question the title of plaintiff in error deraigning title through government patent. As to them, all their right was foreclosed by the proceedings in the land department. But it is claimed now that the defendant Spratt has some greater rights. What are they? Conceding that Spratt was entitled to notice of the cancellation proceedings in the Land Office, let us inquire what would he have had to do if he had received such notice? Clearly he would have been compelled to furnish proof of the good faith of the entries of Smith and Radcliffe. If he didn't furnish said proof the order of cancellation would have been made after notice to him the same as it was made without notice to him. If he would have been compelled to furnish proof of the good faith of the entries before the register and receiver, by what system of reasoning can it be deduced that he is exempt from that obligation now? It must be remembered that while this is a suit to remove a cloud from the title, yet the defendant goes further than simply denying plaintiffs' right to a decree and himself seeks affirmative relief. He asks the Court to decree that he is the equitable owner of the property and that plaintiff holds the legal title in trust for him, and prays the Court to compel plaintiffs to make him a deed for the property. Not content with denying plaintiffs' right, he becomes a petitioner for affirmative relief. Is it too much to ask that before that relief is given him he must show himself entitled to it? He is here attacking our patent not for any fraud or irregularity in the proceedings leading up to the issuance if it, but because as he says the patent should have been issued to Smith and Radcliffe, and if he had been notified of the proceedings to cancel the Smith and Radcliffe entries he could have shown that. Let him show it now.

In Lee vs. Johnson, 116 U. S. p. 49, this Court, in speaking of proceedings in court to correct errors in the land department, said:

"The Court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been

in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be entitled to the patent. It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. Bohall v. Dilla, 114 U. S. 47; Sprake v. Pierce, 115 U. S. 408."

Authorities could be multiplied to any extent maintaining this doctrine. But it is unnecessary to do so. By what rule, then, is the sufficiency of this proof to be offered by defendant in error to be tested? Clearly by the provisions of the statute providing for timber land entries. That statute is found on page 167, vol. 1, Supplement to Revised Statutes. Section 2 of the act reads as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the appellant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; *which statement must be verified by the oath of the applicant* before the register or the receiver of the land office within the district where the land is situated.

"And if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same.

"And any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

Without making the affidavit provided for in this section no

application to purchase could be made by anyone. But the application only initiates the proceeding. The statements contained in it may or may not be true. And the department may at any time cause the truth of these statements to be inquired into. As is said in Hawley vs Diller, 178 U. S. p. 488: "The land department has authority at any time before a patent is issued to enquire whether the original entry was in conformity with the act of Congress." And when the good faith of the entry is challenged by the government, has the government not the right to say that the applicant shall submit himself for examination as to the truth of the statements contained in his original affidavit? The proof upon the hearing must at least be the same as the proof upon the application, and the entryman must come and answer. Conceding, then, that the defendant was entitled to his "day in court" in the land department, he would have had a right to appear in response to the notification that the entry was held for cancellation, and show *by the oath of the applicant* (Smith and Radcliffe) the existence of the conditions set out in the statute. He certainly has no greater right here. He is having his "day in court" now. And the laboring oar is his. In United States v. Steeterson, 50 Fed. Rep. 508, the Court of Appeals for the 8th Circuit said:

"In a contest involving the title to land wherein a person claims adversely to the United States, it is open to such claimant notwithstanding the legal title remains in the United States to prove that by performance on his part of the requisite acts he has become the equitable owner of the land and that the United States holds the legal title in trust for him. But as the claimant in such case has not received a patent or formal conveyance and has not become possessed of the legal title, *he is required to show performance on his part of the acts which when done entitle him under the law to demand a patent for the land. When evidence of this kind is offered on behalf of the claimant*, it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true in a given case that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land and that the United States is merely a trustee holding the legal title for his benefit."

The Supreme Court of North Dakota in deciding the case of Guarantee Bank vs. Bladow, says, 69 N. W. p. 43: "As he is compelled to pursue the legal title in the hands of one who has succeeded to the rights of the government he is of necessity obliged to make out as against such person a legal right to demand the patent from the government. This he may do by showing that his entry was in fact legal. He cannot use the can-

celled certificate for that purpose, for to insist upon his right to use it is to assume the legality of the entry—the very question to be established. He could not, as a matter of fact, use it as *prima facie* evidence in the land department before cancellation in the trial of the issue whether his entry was legal."

This evidence must be offered by the applicant and the government is not required to offer any evidence of the fraudulent nature of the entry. This exact point arose and was decided in Parsons vs. Vieske, 61 N. W. 1041, when the Court says:

"It is further claimed that the local officers erred in requiring Sam Kiser to offer evidence to sustain the entry before any evidence had been introduced by the government. But this was a matter for the decision of the department. The Commissioner or Secretary might have held that this was error and for that reason might have sent the proceedings back for further hearing. But they did not. The sustained the local officers. Assuming that they were wrong, their loss cannot be collaterally reviewed by the courts."

It sufficiently appears from these authorities that if notice had been served upon Spratt of the proceedings to cancel these entries and if he had appeared before the register and receiver the burden would have been upon him to show the good faith of the entry in each case, and a full compliance with the statute and in the manner provided by the statute.

The same burden is upon him now. To hold otherwise would be to hold that the grantee from the original entryman is in a better position because of the cancellation of the certificate than the entryman himself was before the cancellation. And this will hardly be claimed by the defendant in error here. If defendant is rightfully in court at all petitioning for affirmative relief, he is here "*to prove the validity of the original entries*" —and he hasn't done it. For the Court's convenience we print at the end of this brief *all* the oral testimony taken at the trial upon this subject.

It will be seen therefrom that no attempt was made to prove anything except that the land was timber land. Neither Smith nor Radcliffe was called, and no reason is given why they were not called, and not even an attempt was made to show that the entries were made in good faith. This does not comply with the requirements of the statute—would not have been sufficient if offered in the hearing ordered by the Commissioner and cannot be sufficient here. It is no answer to this to say that there is a stipulation on file stipulating as to this record, the record of the land department, including the affidavits of Smith and Radcliffe, "to be considered by the Court." This stipulation merely certifies to the fact that there is such a record and identifies its

contents. It goes to the fact of the existence of those affidavits and not to the truthfulness of their statements. The claim that these copies of affidavits can now be considered by the Court as original testimony here is an afterthought. That it is not made seriously is sufficiently evident from the fact that the defendant called the witnesses Osborn and Hogan to prove the nature of the land—a fact that was as much covered by these affidavits as the fact of the good faith of the entry. To say that the existence of the affidavits is proof of the truth of their contents is to say that the burden of proof is on the government upon the hearing before the register and receiver to show the bad faith of the entries before calling on the entryman for proof in support of them, the very point decided in Parsons vs. Vieske, *supra*, to be not well taken. The record of these entries by Smith and Radcliffe whereby they sought to acquire a whole section of government land that they might sell it at a profit *at once* upon the completion of final proof is a record that might well have challenged the attention of the special agent of the government and prompted inquiry. Frank Smith takes the NE ¼ Sec. 32 as a timber claim and the NW¼ as a pre-emption. James M. Radcliffe takes the SE¼ Sec. 32 as a timber claim and the SW¼ as a pre-emption. And this is how they did it.

TIMBER LAND.

Frank Smith.

May 26-83, applied to register to purchase NE¼ Sec. 32.
Aug. 20-83, paid $400; received final receipt.
Feb'y 13-84, executed deed to Spratt.

James M. Radcliffe.

May 26-83, applied to register to purchase SE¼ Sec. 32.
Aug. 20-83, paid $400, received final receipt.
Feb'y 13-84, deeded to Spratt.

PRE-EMPTIONS.

Frank Smith.

May 26-83, filed declaratory statement, NW¼ 32.
Dec. 12-83, filed notice intention to make final proof.
Jan. 30-84, made final proof.
Feb. 2-84 filed final proof with register; received final receipt.
Feb. 13-84, deeded to Spratt.

James M. Radcliffe.

May 26-83, filed declaratory statement SW¼ 32.
Dec. 12-83, filed notice intention to make final proof.
Jan. 30-84, made final proof.
Feb. 2-84, filed final proof and received certificate.
Feb. 13-84, deeded to Spratt.

The identity of the dates and the method of procedure in each case could leave little doubt in the mind of any impartial agent of the government sent out to investigate such transactions that these entries were all fraudulent and that Smith and Radcliffe were a couple of speculators availing themselves of the government's generosity to obtain title to this land by perjury and get it out of their hands as quickly as possible. Final proof in each of the timber entries was made August 20, 1883. But the final proof in the pre-emption cases was not made until February 2d, (12th ?) 1884. Evidently the sale could not be consummated until all four quarters were ready for delivery. The purchaser, whoever he was, must have it all. So they wait until the pre-emption entries are completed, and on February 13, 1884, deed it all to Spratt. That the sale of the timber lands was made before this is shown by the pleadings. The answer of Spratt (p. 10 Transcript Record) says: "That prior to the 13th day of February, 1884, this defendant purchased said southeast quarter of section 32 from the said James M. Radcliffe and paid him therefor the sum of $800, and that thereafter, and on the 13th day of February, 1884, the said James M. Radcliffe by his said deed duly executed and delivered to this defendant duly conveyed the said land by said deed with full covenants of warranty to this defendant," etc. On page 5 (Transcript of Record) said answer contains identically the same statement with reference to Smith, as follows: "That prior to the 13th day of February, 1884, this defendant purchased said northeast quarter section 32 from the said Frank Smith and paid him therefor the sum of $800, and that thereafter, and on the 13th day of February, 1884, the said Frank Smith by his said deed duly conveyed the said land by deed with covenants of warranty to this defendant."

The execution of this deed apparently completed all the business Smith and Radcliffe ever had in the state of Washington, as they are not again heard of. When the special agent reported adversely to the granting of patent in these cases October 4, 1884, neither Smith nor Radcliffe could be found and have never appeared since. That is the record upon which defendant stands in this case.

The title of the plaintiffs is through a government patent under which they were in possession at the time of beginning of this suit, and they have been paying taxes on said property, as proved by the lower court, since 1890.

To establish by a decision of this court the rule invoked by the defendant in this suit would unsettle titles and make it impossible for anyone to determine by an examination of the records of deeds of the county where the land is situated whether he has a title or not.

These plaintiffs brought upon the faith of a record title going back to a government patent, the source of all titles in this country. The deeds held by defendant are no part of that chain of title and could not have been found by any abstracter searching the title. We are asked now to go behind this patent and set it aside because of the facts appearing in this case. The request has no merit, neither legal nor equitable. No attempt was made at the trial in the court below to show the good faith of these entries. If the methods of these entrymen and their assignees are to be countenanced it would practically bar the government from cancelling entries in any case or on any account. Smith and Radcliffe enter the land and get a final certificate and then disappear. Nobody knows where they are. They sell to a non-resident, and nobody knows where he is. The government wishes to cancel the entries, but cannot find anyone to serve the notice on. And this court is asked to decide that so long as the parties keep out of sight nothing can be done, and the government cannot deal with the land. This request should be refused.

There is another reason why the claim set up by the defendant should not be allowed. It is a stale claim. The defendant, if he had any right at the time of the cancellation of this entry to have the case reopened or heard as to him, has lost that right through his laches. More than sixteen years have elapsed since the pretended purchase by the defendant from Smith and Radcliffe. The defendant has never gone into the possession of the property or attempted to do so, has never exercised acts of ownership over it; never paid taxes upon it, but has allowed these plaintiffs to go into possession and pay the taxes, and has never made any protest, or set up any claim to the property until in this proceeding. Courts of equity will confer no relief to parties so situated, and it is not necessary that the laches of the defendant or the staleness of his claim should be pleaded.

Sullivan v. Portland Ry. Co., 94 U. S. 811.

12 Am. & Eng. Enc. of Law, p. 609.

We respectfully submit that the decisions of the lower court should be reversed and the prayer of plaintiffs' complaint be allowed.

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Appellant.

John M. Gearin.

Appendix to Brief.

TESTIMONY.

C. M. Hogan, called as a witness on behalf of defendant, being first duly sworn, testifies as follows:

Direct examination by Raleigh Scott:

Q 1. Whereabouts do you live, Mr. Hogan?

A. 1. I live in Cowlitz county.

Q. 2. How long have you lived in Cowlitz county?

A. 2. I think about twenty-five years.

Q. 3. What, if any, official position did you hold in that county?

A. 3. I have been a justice of the peace for twelve or fourteen years.

Q. 4. Was you ever a surveyor?

A. 4. I have surveyed a great deal, but not in the way of any official capacity.

Q. 5. You may state, Mr. Hogan, whether or not you examined the northeast quarter of section thirty-two, township nine, north of range four west, Cowlitz county, Washington, in company with Special Agent Stubbs; and the southeast quarter of the same section, township and range, that is in company with Special Agent of the United States, Stubbs, about September or October, 1884?

A. 5. I did.

Q. 6. In company with whom did you examine these tracts?

A. 6. With Mr. Stubbs and Mr. Dietz. (or Deats).

Q. 7. With B. F. Dietz?

A. 7. Yes, sir; with B. F. Dietz.

Q. 8. Where is B. F. Dietz now at?

A. 8. He went to Minnesota, or Colorado, I believe.

Q. 9. I understand he is dead.

A. 9. Yes, sir; so I am told.

Q. 10. Do you know his wife?

A. 10. I am slightly acquainted with her.

Q. 11. Now what is the character of that land with reference to the timber upon it?

Mr. Gearin. I object to any testimony being received at this time touching the character of the land, for the reason the same is incompetent and immaterial and because the records introduced show that the land department passed upon that question as a question of fact, and the decision of the land department is conclusive.

Court. The Court will permit the testimony and the ques-

tions may be argued at the final submission. The question may be asked as to the quality of the timber.

A. 11. The timber is excellent. It is as good as any in that section of the country.

Q. 12. In Cowlitz county?

A. 12. Yes, sir; Cowlitz county.

Q. 13. About how many feet of saw timber would you estimate is on the land?

A. 13. At the time we examined it, we measured off what we considered an ordinary acre of land and estimated the amount that each tree would give, and in calculating found we could get considerable over two hundred thousand feet.

Q. 14. State if about that time, or since, you have examined a great deal of timber land for the government of the United States?

A. 14. I have examined a number of tracts, perhaps sixty or seventy.

Q. 15. In what part of the country?

A. 15. In that part: Cowlitz and Wahkiakum counties.

Q. 16. What would you say about that being a quarter section or half section of good timber; was there any better timber in that part of the country?

A. 16. It is as good as any I ever examined. In fact, there is none better in that part of the country.

Q. 17. Well, what would you say about the quality?

A. 17. It is large to the acre.

Q. 18. Now is that land especially valuable for cultivation or timber?

A. 18. No; no land there but what is covered with timber. It would have to be cleared in order to be cultivated.

Q. 19. Well, after it is cleared, what would you say; is it good for agricultural purposes, or not?

A. 19. Yes, after it is cleared, it is worth that. It would have to be cleared first.

Q. 20. Well, then, what would you say as to its chief value in its then condition, when you examined it—its timber or soil for cultivation?

A. 20. In its existing condition I should say timber value.

Q. 21. Chief value?

A. 21. Chief value, yes, sir.

Q. 22. State if you informed Agent Stubbs that you would testify that the claimant took the northeast quarter of said section for speculation?

Mr. Gearin. Objected to as incompetent.

Mr. Stott:

Q. 23. Did you give Stubbs any reason to believe that you would so testify?

Mr. Gearin. Objected to as incompetent.

Mr. Stott:

Q. 24. Did you have any intimation or reason to think that the claimant, Frank Smith, had taken up that claim for speculation?

A. 24. I had no reason to think so, because I did not know Frank Smith, or any of them, or any of the parties, but my knowledge was simply of the land as I examined it.

Q. 25. Had you ever had any intimation that Frank Smith had taken that timber claim for speculation?

Mr. Gearin. Objected to as incompetent.

Court. Objection sustained.

Mr. Stott:

Q. 26. Now, what would you say about the southeast quarter taken by James Radcliffe. Had you any reasons to believe that Radcliffe took the land for speculation?

Mr. Gearin. Objected to as before.

Court. The objection is overruled.

Witness:

A. 26. *I know nothing concerning them whatever. I know none of the parties, either before or since I examined the land My knowledge, as stated before, is simply of the land as I examined it.*

Q. 27. Did you say you examined the southeast corner also?

A. 27. I examined the whole section.

Q. 28. All about the same?

A. 28. Yes, sir.

Q. 29. And its chief value was for timber?

A. 29. For timber in the condition it was when I examined it.

Q. 30. In its then condition?

A. 30. Yes, sir.

Cross examination, conducted by Mr. Gearin:

Q. 31. Mr. Hogan, you were a witness at the solicitation of Mr. Stubbs to examine this land, and signed the affidavit as to the character of the land, did you not, at that time?

A. 31. Yes, sir; I was a witness in the examination of that land at the instance of Mr. Stubbs.

Q. 32. You went on the land with Mr. Stubbs for the purpose of becoming a witness as to its character, that is, whether it was agricultural or not?

A. 32. Yes, sir.

Q. 33. It was for that purpose you went there?

A. 33. Yes, sir.

Q. 34 There is a certified copy in the record in this case reported to be your affidavit. Have you read it?

A. 34. I read one. I don't know whether it is the one you refer to or not.

Q. 35. I will ask you if that affidavit is like this: Regarding these two quarter sections of timber land, and speaking of the soil you described as "a clay land, generally rolling and covered with a heavy growth of fir, cedar and hemlock trees, and said, 'I consider this good agricultural land,' and could be profitably cultivated after the timber is removed," Did you say that?

A. 35. I did.

Q. 36. Was that true?

A. 36. I believe so.

Re-direct examination, conducted by Mr. Stott:

Q. 37. Your idea is in order to be cultivated properly the timber would have to be taken off?

A. 37. After the timber is cut off it would become good land to cultivate.

Q. 38. But until it is cleared it is not fit to cultivate?

A. 38. Of course not.

Q. 40. What kind of timber, that is, was the timber valuable?

A. 40. Yes, sir; it was very valuable.

Q. 41. On both of the quarter sections?

A. 41. Yes, sir; the whole section.

Q. 42. Did you have any conversation with Mr. Stubbs as to whether this was good agricultural land or not?

Mr. Gearin: Objected to for the reason the same is incompetent and immaterial.

Court: The objection is sustained.

Robert Osborn, being called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination, by Raleigh Scott:

Q. 43. Where do you live, Mr. Osborne?

A. 43. In, Portland, Oregon.

Q. 44. How long have you lived in Portland, Oregon?

Q. 45. How old are you?

A. 45. Fifty-nine years.

Q. 46. Are you acquainted with the land in question?

A. 46. Yes, sir.

Q. 47. Have you examined it?

A. 47. I have.

Q. 48. When?

A. 48. Let me see. Last fall. I can tell you the date (referring to memoranda), September 4th.

Q. 49. Ninety-eight?

Q. 49. Ninety-nine.

Q. 50. What experience have you had in examining timber lands?

A. 50. Pretty much all my life.

Q. 51. Where? In the West here or ———

A. 51. In Michigan, Wisconsin, Minnesota, Washington and Oregon.

Q. 52. Well, now state what you saw. Give us your views.

A. 52. Concerning the timber land, you mean?

Q. 53. Did you examine the northeast quarter of section thirty-two, town 9, N. R. 4, west?

A. 53. I did.

Q. 54. Describe the land with reference to the timber upon it?

Mr. Gearin: I object for the same reasons previously given.

Court: The Court will permit the question to be asked. And it may be argued at the final submission.

A. 54. There was a heavy growth of timber. A very heavy growth. But I put it that the northeast quarter would cut one hundred and twenty-five or thirty-five thousand to the acre, running thirty per cent. cleared, but not including all the timber on the land.

Q. 55. You mean only the fir would run one hundred and thirty-five to the acre, or all the timber?

A. 55. Yes, sir; not running less than thirty per cent. cleared. There is some hemlock which I do not include. I do not include that at all.

Q. 56. What is the chief value of that land, for timber or agriculture?

A. 56. The entire value is only timber, in my judgment.

Q. 57. In its present condition?

A. 57. Yes, sir.

Q. 58. Could not cultivate it in its present condition, at all?

A. 58. No, sir.

Q. 59. How far is this land from the Columbia river?

A. 59. About two miles.

Q. 60. What opportunity is there for taking these logs to the river?

A. 60. Could take them by Mill Creek. Could go that way, or could take them out by railroad.

Q. 61. Well, what do you say as to the southeast quarter?

A. 61. Same character as the northeast; same quality of timber, but not quite so much timber.

Q. 62. How much would you say was on that tract?

A. 62. About one hundred thousand to the acre. It is the same character of timber, and there might be as much timber,

but on account of the badly broken country, can't save as much on that as you can on the northeast.

Q. 63. Because the character of the surface soil is broken?

A. 63. Yes, sir.

Q. 64. How much, if any, of that could be cultivated in its present condition?

A. 64. I don't think any of it.

(No cross-examination.)

It is stipulated by the attorneys in this case in open court, that the Court take judicial notice of any rules, regulations or decisions of the Land Department pertaining hereto.

The deposition of A. N. Spratt is considered read.

DEPOSITION OF A. N. SPRATT.

Direct Interrogatories and Answers.

1st. State your name, age, and present place of residence.

Ans. Augustus N. Spratt, Oakland, Calif., aged 61 years.

2d. Did you purchase section 32, township 9, north of range 4 west of Willamette Meridian, Territory of Washington (now State)?

Ans. Yes.

3rd. If so, the date of purchase, from whom purchased, and the amount paid for the same?

Ans. 1884. From James M. Radcliffe and Frank M. Smith, through my agent. Total amount paid out in connection with, and for, section 32, including Smith and Radcliffe, my agent, and others, my personal expenses, taxes, legal charges, advice, &c., &c., about $4400.00.

4th. Did you have any agreement, directly or indirectly, with James M. Radcliffe and Frank Smith, in reference to the purchase of said land before final proof and issuance of final duplicate Receiver's receipt for said land?

Ans. No. I do not think I ever heard of them, even.

5th. Where was your place of residence during the year 1884. And how long did you reside there?

Ans. Alpena, Michigan. Thirty years.

6th. Did you ever receive any notice of any kind, or did you have any knowledge that said entries of Frank Smith and James M. Radcliffe covering section 32 had been held for cancellation, or that the same had been cancelled?

Ans. I have no recollection of having received any notice; and from the fact that I continued to pay taxes on section 32 for some years, I am confirmed in the belief that any information that I may have obtained was in the nature of hearsay.

7th. State how and when you first learned that said entries had been cancelled by the Land Department?

Ans. I cannot, further than has been indicated in my answer to question six.

AUGUSTUS N. SPRATT.

CROSS INTERROGATORIES AND ANSWERS.

1st. Did you go upon section 32, or any portion of said section, prior to your purchase from Radcliffe and Smith?

Ans. Yes.

2d. Did you ever go upon said section 32, or any portion of said section?

Ans. Yes.

3rd. How long had you known James M. Radcliffe or Frank Smith, or either of them, before your purchase from them of the different quarter sections comprising section 32?

Ans. I have no recollection of ever having known them at all prior to the purchase.

4th. Where did you meet them, and at what place was the sale consummated between Radcliffe and Smith and yourself?

Ans. I do not recollect of ever having met them.

5th. How much did you pay Radcliffe and Smith for the land, and how much did you pay for each quarter section? State fully the manner of payment.

Ans. I think that I paid Radcliffe and Smith about $800 for each quarter section. I do not recollect the manner of payment.

6th. Is it not a fact that you supplied Radcliffe and Smith with the necessary money to make entries and improvements on the different quarter sections of said section 32, under an agreement that the land should be taken up in their name and afterwards transferred to you?

Ans. I do not recollect of ever having had any business whatever with Radcliffe and Smith, or either of them, prior to purchase of said section 32.

7th. Did you have any actual notice by personal observation of the character of the land in said section 32, as to whether the same was timber land or not?

Ans. Yes.

9th. Please examine the letter hereto attached, marked Exhibit A, and state if you wrote the same, and what was your object in writing it.

Ans. I wrote the letter marked Exhibit A. I had been informed that my right to a title to that section 32 was considered to be good. I was also informed that Whitney and others would commence suit for the purpose of forcing me to quitclaim my

interests. Whitney was a very wealthy man and I was not, and I felt that I could not afford to enter into a law suit with any millionaire; so I wrote the letter hoping I might receive a liberal amount by way of compromise. I could not afford to quitclaim without reimbursement.

AUGUSTUS N. SPRATT.